

NO. 82-1154

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

BOROUGH OF SAYREVILLE, JOHN E. CZERNIKOWSKI, RANIERO TRAVISANO, KENNETH W. BUCHANAN, SR., WILLIAM JACKSON, JOSEPH M. KEENAN, JR., THOMAS R. KUBERSKI and FELIX WISNIEWSKI,

Petitioners,

vs.

MIDDLESEX COUNTY UTILITIES AUTHORITY and WILLIAM FRENCH SMITH, UNITED STATES ATTORNEY GENERAL, et al.,

Respondents.

On Petition for Certiorari to the
United States Court of Appeals for the
Third Circuit

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BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

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MILTON B. CONFORD
Counsel of Record for
Respondent, Middlesex
County Utilities Authority

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
900 Route 9, P.O. Box 10
Woodbridge, N.J. 07095
(201)636-8000

JOHN A. HOFFMAN,
Of Counsel.

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Except for the Point which follows here-
inafter, respondent Middlesex County Utili-
ties Authority relies for its opposi-
tion to the petition for certiorari in this
matter upon the opinion of the United

States Court of Appeals for the Third Circuit, reported at 690 F.2d 358 (1982), and upon the opposition brief which will be filed in this matter by the federal agency respondents.

THE PETITION FOR CERTIORARI
SHOULD BE DENIED ON GROUNDS
OF ESTOPPEL.

Petitioner Sayreville joined with the other 24 municipal and the industrial participants in the Middlesex County Utilities Authority ("MCUA") system in an agreement for the undertaking of an extensive program of necessary improvements of the sewerage system requiring substantial federal assistance available under the Federal Water Pollution Control Act ("FWPCA") (P3a). It did so voluntarily, and presumably in pursuit of the common objective of upgrading the treatment processes of the MCUA complex in order

to comply with new stringent regulations for the quality of sewage effluent mandated by the Federal Water Pollution Control Act ("FWPCA") as amended in 1972. 22 U.S.C. §1251 et seq. The importance of this legislation has been the subject of frequent comment by the courts. See EPA v. State Water Resources Control Board, 426 U.S. 200 (1976); Milwaukee v. Illinois, 451 U.S. 304 (1981); Train v. City of New York, 420 U.S. 35, 45 (1975). Because all the participants in the MCUA system knew that the statute and regulations made it a prerequisite of grant of federal funds for improvement construction purposes that grantees and participants therein adopt sewer user charge systems, 33 U.S.C. 1284 (b)(1) (see P3a), it was unanimously agreed in the 1975 supplemental agreement that each participant would adopt such sewer user charge ordinances as would be

satisfactory under EPA regulations. Ibid. Knowing that MCUA and its co-participants were relying upon the performance of the agreement by all of its signatories to assure receipt of all of the funds authorized to be granted, Sayreville nevertheless reneged on the agreement. EPA thereupon withheld from MCUA 20% of the authorized federal grant (P6a). MCUA has consequently been damaged to the extent of the necessity of going into the financial markets to borrow funds to meet construction costs at considerable ongoing interest expense. Were Sayreville to be successful in its intransigent position of repudiation of its agreement, MCUA would sustain, in addition to the ongoing interest expense, a capital loss of approximately \$13.5 million in withheld EPA grant funds.

We contend that in these circumstances

Sayreville should be estopped from challenging the validity of the statute and the regulations in repudiation of its 1975 agreement.

MCUA made this argument in the Court of Appeals, but that court did not deal with it.

"It is a well recognized rule in constitutional law that estoppel may operate to prevent a party from asserting that an act is unconstitutional, unless the proceeding under the act or what is sought to be accomplished is per se illegal. Such estoppel may arise from specific conduct or from inaction". 16 Am. Jur. 2d, Constitutional Law, 207, p. 623.

The doctrine is readily invoked against a party which has proceeded or accepted benefits under the statute subsequently attacked. Id. §209, p. 625; and see State Div. of Human Rights ex rel Kozlowski v. State, 62 A.D. 2d 617, 406 N.Y.S. 2d 401 (1978). Sayreville as a participant is certainly enjoying the bene-

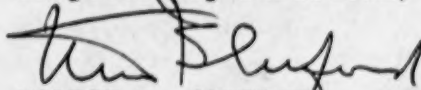
fits of the upgrading of the MCUA system achieved by use of the EPA grant funds obtained and to be obtained pursuant to the statute and regulations it now repudiates, and MCUA relied upon Sayreville's agreement to adopt a sewer user charge system satisfying the statute and regulations in going forward with the project and applying for a federal grant.

We therefore submit that certiorari should be denied on grounds of estoppel as well as for the other reasons stated in the Court of Appeals opinion and in the brief of the federal agency respondents.

CONCLUSION

For the reasons aforesaid, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,



MILTON B. CONFORD
Counsel of Record for
Respondent, Middlesex
County Utilities Authority

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
900 Route 9, P.O. Box 10
Woodbridge, N.J. 07095
(201) 636-8000

John A. Hoffman,
Of Counsel

Dated: January 24, 1983